Citizen enforcement laws are playing with fire

Overview

In 2021 Texas enacted a law (SB 8) that prohibits abortions after the fetal heartbeat has been detected and empowers private citizens to sue anyone who has (or intends to) perform, aid, or abet such an abortion.[1] The law also bars "enforcement" by state and local government, except that a court must award an injunction, statutory damages not less than $10,000, and attorney fees if the claimant prevails.[2] California has now enacted a copycat law (SB 1327) that employs the same mechanisms to permit citizen enforcement of certain California firearms laws.[3] Doing so wrongly validates a law that undermines constitutional review and will legitimize the Texas law's perfidy.

Analysis

The mechanics of Texas SB 8 are unconstitutional

In defending SB 8 Texas argued that a federal court cannot enjoin its law because only private citizens enforce it. Because the state is prohibited from enforcing the law and the courts have no way of knowing which private citizens will file lawsuits, the argument is that courts cannot preemptively enjoin the law pre-enforcement. The U.S. Supreme Court agreed, holding that federal courts exercising their equitable authority can neither enjoin the world at large nor enjoin challenged laws themselves.[4] The result is an end-run around federal constitutional protections.[5]

That rationale rests on the faulty premise that a law can both foreclose public enforcement and instruct courts to render valid legal judgments. A law that simultaneously uses and bars state action presents courts with a difficult question about whether judicial actions under this law meet the state action requirement. The Texas and California laws should satisfy the criteria for state action.

The state action requirement is a rule that distinguishes between private and government action in legal processes, with only government acts being subject to the due process constraints of the federal and California constitutions.[6] That requirement is met here by a state court entering a judgment and by the state law mechanisms used to enforce that judgment. State action "refers to exertions of state power in all forms," and "judicial action is to be regarded as action of the State for the purposes of the Fourteenth Amendment."[7] If Texas can "enforce" a trial court's judgment issued under the law, that is state action. Conversely, if Texas cannot "enforce" a trial court's judgment under the law, then the law is a nullity because it has no effective remedy. The same analysis applies to California's SB 1327: permitting citizens to use the state courts to obtain judgments and to leverage the state processes for enforcing those judgments is enough of a state action to invoke due process protections. Even private enforcement of a law that requires a state court to issue judgment — and orders to carry out that judgment — are still state action.

California's copycat laws are likewise problematic and raise distinct California concerns

California's SB 1327 includes the same mechanisms and relief for private citizens enforcing the law through civil actions, including statutory damages "of not less than ten thousand ($10,000) for each weapon or firearm precursor" and non-reciprocal attorney's fees if the suing citizen prevails.[8] Thus, California's new law has the same flaws as the Texas law.

The lack of reciprocal attorney fees in both laws puts all the risk on either the defendant being sued for firearms violations or on the plaintiff who challenges a government firearms regulation — including the attorneys and law firms representing them. The upshot is that firearms purveyors and those aggrieved by government firearms regulations act at their peril, while citizen enforcers and the government never risk fees liability even for taking frivolous positions. This lack of attorney fee reciprocity is remarkable given California's history of ensuring that contractual attorney fees provisions are bilateral.[9]

These provisions implicate the right to petition under both the federal and California constitutions. A California court could reasonably conclude that the threat of attorney fees merely for suing the government to challenge a firearms regulation is an unconstitutional abridgment of the right to petition, especially where the statute is a content-based restriction.[10] Yet California has "an unusual distinction between suits between persons and suits against the government."[11] And precedent that could stop the government from obtaining attorney fees from private litigants does little to address the statutory damages and lopsided attorney fees for citizen enforcement suits.[12]

California also has distinct concerns involving private citizen enforcement that evades judicial review. Legalizing a process with incentives to pursue bounties with little downside raises concerns about majority interests oppressing minority interests. Along with a bill of rights, judicial review serves an important counter-majoritarian function, protecting minority interests from having certain rights infringed on by majority voting interests:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[13]

If California can adopt laws that evade judicial review, then the state stands to lose a cornerstone of constitutional government: protection for minority rights.

California's copycat gun control laws will not achieve their desired ends

California will gain little from copying the Texas law. The stated purposes of SB 1327 are to advance public safety, and to expose the moral bankruptcy of the Texas approach.[14] Neither is likely to occur.

SB 1327 will not improve public safety because it does nothing to change substantive firearms regulation. Instead, it merely proscribes conduct that is already

illegal under California law.[15] This will have no new effect on the substance of firearm legality or firearms regulation, doing little more than imposing a lopsided, one-way risk of attorney fees on a politically disfavored group. It will not improve public safety in California, nor cause firearms purveyors already engaging in legal conduct to close (as abortion clinics in Texas have).

Rather than demonstrating the illegitimacy of the Texas approach, SB 1327 will have the opposite effect. SB 1327 provides that it will "become inoperative upon invalidation" of a specific portion of Texas law by "the United States Supreme Court or the Texas Supreme Court."[16] But the U.S. Supreme Court likely will maintain the approach it adopted with SB 8 and permit both laws to remain in effect. Lawmakers will grow accustomed to it, and different permutations will begin to appear as ballot propositions. According to the chair of California's Senate Judiciary Committee, the California law is nothing more than "monkey see, monkey do."[17] Yet by copying the Texas law California only serves to legitimize it.

These laws will pit citizens against each other and undermine due process

Unlike other citizen enforcement laws, Texas SB 8 and California SB 1327 will erode recognized civil liberties by pitting citizens against one another. SB 1327 encourages a plaintiff who has experienced no injury to file a lawsuit to prevent another citizen from taking actions associated with a federal constitutional right — and there is no way to file a pre-enforcement challenge to the law. This novel scheme is unlike the California Private Attorneys General Act, which allows for a "civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees" for labor code violations.[18] It is unlike a *qui tam* action, which allows "a private party" to bring "an action on the government's behalf," and "[i]f the government succeeds . . . [to] receive[] a share of the award."[19] It is unlike California's environmental statutes "that, on their face, give enforcement power to almost any member of the public."[20] These environmental statutes are closely tied to state statutory or constitutional rights to a clean environment, meaning the plaintiff can at least be said to have experienced an indirect injury.[21] By contrast, SB 1327 allows plaintiffs who have experienced no injury to attack

constitutional rights in a manner intended to evade judicial review.

The California legislature knew SB 1327 had serious constitutional flaws. The Senate Judiciary Committee analysis noted that "[b]eyond just simply allowing for private rights of action, [SB 1327] also includes a series of procedural mechanisms that are particularly problematic, and arguably raise serious due process concerns."[22] These include: liability "if a person knowingly engages in conduct that aids or abets a violation . . . regardless of whether the person knew or should have known that the person aided or abetted would be violating" the law; a one-sided requirement to pay attorneys' fees; eliminating "[n]onmutual issue preclusion [and] nonmutual claim preclusion" as defenses to lawsuits under this new law; allowing defendants to be sued in any county; and precluding defendants from transferring venue.[23] Serious due process concerns abound.[24]

Clever laws like SB 8 in Texas and SB 1327 in California undermine the concept of ordered liberty. Legislatures should not be in the business of knowingly enacting unconstitutional bills just to make a point. Experiments with evading constitutional review often go awry: for example, in Oklahoma a state senator introduced a similar bill "that would allow teachers to be sued for $10,000 for each time they say something in the classroom that may contradict a student's religious beliefs."[25] And a Florida law now bans public school teachers from "holding classroom instruction about sexual orientation or gender identity."[26] With SB 1327, California has joined the group of states that harm their own citizens for political gain.

Conclusion

Laws that are designed to evade judicial review, are adopted despite warnings of grave constitutional concerns, and penalize citizens for proper use of the courts do not further justice. And California's direct democracy provisions amplify the risk that private citizen enforcement can result in majority interests oppressing minority interests — just imagine how creatively the SB 1327 structure can be deployed in a ballot proposition. Texas SB 8 and California SB 1327 both raise serious constitutional questions and work against our tripartite form of government.

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1. Tex. Sen. Bill No. 8, 87th Leg., (2021) Reg. Sess. ↑
2. Tex. Health & Saf. Code §§ 171.207–171.208. In September 2021, the U.S. Supreme Court issued an opinion in an interlocutory appeal on a pre-enforcement challenge. *Whole Woman's Health v. Jackson* (2021) 141 S.Ct. 2494. And in January 2022, it denied mandamus after the Texas Supreme Court told the Fifth Circuit that the "law does not grant the state-agency executives named as defendants . . . any authority to enforce the Act's requirements, either directly or indirectly." *In re Whole Woman's Health* (2022) 142 S.Ct. 701; *Whole Woman's Health v. Jackson* (Tex. 2022) No. 22–0033. ↑
3. SB 1327 targets firearms (such as assault weapons) that California has made illegal. Sen. Bill No. 1327 (2021–2022 Reg. Sess.) § 1. ↑
4. *Whole Woman's Health v. Jackson* (2021) 142 S.Ct. 522, 528. ↑
5. *Id.* at 545 (conc. & dis. opn. of Roberts, C.J.). ↑
6. *See Garfinkle v. Superior Court* (1978) 21 Cal.3d 268, 280–282. ↑
7. *Shelley v. Kraemer* (1948) 334 US 1, 20, 15. See also *Twining v. New Jersey* (1908) 211 U.S. 78, 90–91 ("The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State."); *Brinkerhoff-Faris Trust & Savings Co. v. Hill* (1930) 281 U.S. 673, 680 ("The federal guaranty of due process extends to state action through its judicial [branch] . . . the action of the States to which the [Fourteenth Amendment] has reference includes action of state courts and state judicial officials."). ↑
8. Sen. Bill No. 1327 (see Bus. & Prof. Code, §§ 22949.64(a), 22949.65(a)–(b)(3); Code Civ. Proc., § 1021.11); Assem. Bill No. 1594 (see Civ. Code § 3273.52(d)(3)). ↑
9. Civ. Code § 1717. ↑
10. Sen. Bill No. 1327 (Code Civ. Proc. § 1021.11). ↑
11. *Wolfram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 50. ↑
12. *Wolfram*, 53 Cal.App.4th at 50 (distinguishing between lawsuits between persons and suits against the government). ↑

13. *Board of Education v. Barnette* (1943) 319 U.S. 624, 638 (per Jackson, J.). ↑
14. Morain, *California Imitates the Wrong Texas Law When It Comes to Gun Control*, Wash. Post (Apr. 7, 2022). ↑
15. Sen. Bill No. 1327 (2021–2022 Reg. Sess.) § 1; Assem. Bill No. 1594 (2021–2022 Reg. Sess.) § 1. ↑
16. Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1327 at 7. ↑
17. The Guardian, *'Never Tried Before': California Lawmakers Use Texas Tactics in Bid to Tackle 'Ghost Guns'* (Apr. 6, 2022). ↑
18. Lab. Code, § 2699(a). ↑
19. *Wex* (2022). ↑
20. *Maneuvering Around the Court: Stanford's Civil Procedure Expert Diego Zambrano on the Texas Abortion Law*, SLS Blog (Sept. 8, 2021). ↑
21. *Ibid.* ↑
22. Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1327 at 12. ↑
23. *Id.* at 12–14. ↑
24. U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7. ↑
25. Kindy & Crites, *The Texas Abortion Ban Created a 'Vigilante' Loophole. Both Parties are Rushing to Take Advantage*, Wash. Post (Feb. 22, 2022). ↑
26. Diaz, *Florida's Governor Signs Controversial Law Opponents Dubbed 'Don't Say Gay'*, NPR (Mar. 28, 2022). ↑